IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & ONYANGO OTIENO, JJ.A)

CRIMINAL APPEAL NO. 134 OF 2007

BETWEEN

DAVID NGUGI GICHURU..APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ombija, J.) dated 12th April, 2007

in

H.C.CR.C. NO. 41 OF 2004)
****

JUDGMENT OF THE COURT

In the information dated 17th February 2004, the appellant ***David Ngugi Gichuru*** was arraigned before the superior court for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code, Cap 63, Laws of Kenya, the particulars of which were that:-

"On the 21st day of May, 2000, at Kambaa village in Kiambu District of Central Province murdered Peter Mungai Wambuthi."

He pleaded not guilty to the charge, but after full trial in the superior court, the learned Judge of the superior court (N.R.O. Ombija J.) found him guilty, convicted him and sentenced him to death as provided by law. In convicting the appellant, the learned Judge stated in his concluding remarks as follows:-

"On the whole, the evidence of the prosecution appeared consistent. The witnesses appeared to me to be credible and dependable. The accused on the other hand, appeared to me to be a person with no regard for the truth. I reject his alibi in toto. His defence is a hollow sham. I find him guilty as charged.

I sentence the accused to suffer death as provided for in the law."

The appellant felt unsatisfied with that decision, hence this appeal premised on four main grounds of appeal filed by the appellant in person on 24th April 2007 and five grounds contained in the supplementary memorandum of appeal dated and filed by his advocate on 9th May 2011. Mrs. Nyamongo, the learned counsel for the appellant, in her submissions before us relied on both the home-

made grounds and on the supplementary grounds. She did not however, pursue first, second, and fourth grounds in the supplementary grounds filed by her for the appellant. A summary of all grounds were that the learned Judge erred in convicting the appellant while there was no direct evidence identifying the appellant as the person who killed the deceased; that there was no weapon produced in court and as such the cause of the deceased's death was not proved to the standard required in law; that the learned Judge erred in convicting the appellant on the face of contradictions and discrepancies in the prosecutions case which were not considered; that the learned Judge failed to comply with the provisions of ***section 169 (1)*** of the Penal Code. (We presume of the Criminal Procedure Code as ***section 169 (1)*** of the Penal Code is irrelevant); that the charge was defective and no conviction could be based on it, that the learned Judge failed to note that unqualified person had conducted the case; that the court failed to note that the appellant's constitutional rights as provided under ***sections 77 (1)*** and ***77 (2) (b)*** were violated and failed to take action to remedy the same; that the learned Judge failed to appreciate that the burden of proof could not shift to the appellant at all during the trial and he failed to consider that the appellant had discharged his burden of raising the defence of alibi.

The appellant was nephew to the deceased Peter Mungai Wambuthi. Michael Fundi Muigai Peter (PW3) was son of the deceased and cousin to the appellant. Peter and deceased were sleeping in the main house while the appellant, who had gone to visit them was sleeping in the kitchen. On 20th May 2000, Peter, who had been working at his normal work place, went home at 9.00 p.m. He found the deceased asleep. He also went and slept. At 6.00 a.m. next morning, the appellant who slept in the kitchen gave Peter Ksh.20 to go and buy milk. Peter obliged. It took him about fifteen (15) minutes to return home. In the mean time, Boniface Mbugua Ngure (PW1) whose house was neighbouring the deceased's house heard a scream from the deceased's compound. On responding to the scream which had by then intensified, he identified the voice of the person screaming as that of his neighbour, the deceased. He ran towards the direction of the scream and saw a glimpse of a man running away. On reaching the deceased's compound, the deceased came out of his house running. Boniface followed him and the deceased fell down at an adjacent road about 100 metres from Boniface's house and 50 metres from the deceased's house. Blood was all over his body. Boniface administered first aid on the deceased for about 30 minutes and talked to him. He gave Boniface in Kikuyu a statement which in English is that:-

"Even if I die it is a man called Ngugi who has killed me. He was talking about the shamba last night."
On returning to the house, Peter found his father the deceased out of the house although he had left him sleeping in the main house. The appellant was also not at home whereas he had left him there. The door to the main house was open. Peter saw blood at the door. He entered the house and found more blood on the wall. As his father, the deceased, was not in the bedroom, Peter turned and started tracing the deceased by following a trail of blood. He found the deceased on the road. He was still alive but had cuts on the head, lips and on the hands. The deceased told him that it was Ngugi, the appellant who had cut him. Kabuga Njoroge (PW2) who heard of the incident from a certain lady went, called Isaac Kimani (PW4) and gave the same Isaac a bicycle which Isaac used to go to his father to report the incident. His father gave him Kshs.500/- to use for transporting the deceased to the police station and then to the hospital. Isaac hired a vehicle to take the deceased to hospital. He took him to Githunguri Health Centre where first aid was done and thereafter he took him to Kiambu District Hospital where the deceased was admitted. On the way to Kiambu District Hospital, the deceased told Isaac that it was David Ngugi who had cut him, but as the deceased was in a lot of pain he did not state why the appellant cut him. Isaac reported the incident to the police. PC Ken Otieno (PW5) who was attached to Githunguri Police Station, was informed about the report and observed that the report had already been booked. As a result of the information, received, PC Otieno went to Githunguri Health Centre but found the deceased had been given first aid and rushed to Kiambu District Hospital. On 27th May 2001, PC Otieno received a report that the deceased had succumbed to his injuries. On that same day before receiving the report of the death of the deceased, the appellant presented himself to the police station. The appellant introduced himself, according to PC Otieno as deceased's step son and he wanted to know the condition of the deceased. PC Otieno called O.C. crime and the appellant was arrested on a charge of assault awaiting the filling of P3 form. The body was removed to the City Mortuary and on 30th May 2000 Dr. Maundu did post mortem on it. Dr. Jane Wasike Simiyu (PW6) who was conversant with the signature of Dr. Maundu produced the post mortem report under ***section 77*** as read with ***section 33*** of the Evidence Act as Dr. Maundu had since retired and was settled in Uganda. As a result of the examination, Dr. Maundu formed the opinion that the cause of

death was head injury with brain haemorrhage, extensive blood loss due to multiple cuts by a sharp object. The appellant was thereafter charged with this offence. As at the relevant time committal proceedings were part of the required procedures before the trial proper could start in the superior court. Although the appellant was first taken to the subordinate courts on 16th June 2000, he was not committed to the superior court for hearing till 5th March 2002 close to two years after his arrest. This is deplorable, but we take judicial notice that there were at the relevant time no set, definite procedures for dealing with cases where police delayed in submitting to subordinate court's committal proceedings and there was no time limit set out for that requirement. Be that as it may, even after the appellant was committed to the High Court for trial, on 5th March 2002, he was not produced in the High Court till 15th March 2004. No reason is given for that delay but as that aspect does not go into proof or otherwise of the guilt of the appellant and as the appellant's advocate did not raise the issue in the High Court we leave it at that and treat the above as our response to the grounds of appeal that alleged breach of constitutional rights of the appellant.

In the superior court, the appellant gave an unsworn statement in which he stated that on 20th May 2000, he was engaged in his work of hawking and did that until 27th May 2000 when two people approached him and told him he was required by the OCS Githunguri Police Station but instead of taking him to OCS, he was taken to the cells and later he was told he was a criminal. On 14th June 2000, the OCS called him and read a charge to him but he denied it and on 16th June 2000 he was taken to court. He still denied the charge.

The above were the facts before the learned Judge and upon which he acted to convict the appellant. Mrs. Nyamongo contended that the learned Judge of the superior court erred in convicting the appellant. While conceding that on the face of the record, the deceased made dying declarations before his death to Peter, to Boniface and to Isaac, she contended that the dying declarations should not have been relied on to convict as none of the witnesses saw the incident and that in any event as the deceased took sometime before he died after making the alleged dying declaration, the same could not be treated as dying declaration as dying declaration is one made by a deceased who is about to die. However, on being shown the provisions of ***section 33 (a)*** of the Evidence Act, Mrs. Nyamongo conceded that no time limit is set for dying declarations. She further submitted that in the circumstances of this case, the failure to state and produce the weapon used to inflict the injury upon the deceased was fatal and maintained that it was not enough to merely say as was stated in the post mortem report that a sharp object was used. She went on to state that the appellant's rights under the constitution were violated as he was kept in police custody for more than the maximum period stated in the constitution. She ended by submitting that as the deceased died several days later, other intervening events could have caused his death other than assault.

Mr. Monda, the learned Senior State Counsel opposed the appeal, submitting that the dying declaration given by the deceased was credible but was not the only piece of evidence connecting the appellant with the offence. He said the other pieces of evidence were first that in the morning of 20th May 2000, at about 6.30 a.m. when Peter was sent by the appellant for milk, only three of them namely the deceased, the appellant and Peter were in the deceased's compound. Peter went for milk and that left only the appellant and deceased in the compound. When Peter returned, both the deceased and appellant were not there. In that scenario, Mr. Monda contended, the appellant must have known what happened to the deceased and thus the dying declaration by the deceased was credible as it reflected the truth. Secondly, the totality of the evidence on record pointed to the appellant and none other as the perpetrator of the offence, and lastly, Mr. Monda submitted that the appellant had opportunity to commit the offence as the deceased was left with him alone when he sent Peter for milk. As to the allegation of other intervening matters between the deceased's date of death and the date of assault, Mr. Monda's take was that no such intervening matters were alleged at the time of hearing to warrant consideration. On allegation of violation of appellant's rights, he said that was not raised at the opportune time during the hearing of the case and in any case such issue has no bearing on the guilt or innocence of the appellant.

It is not in dispute, and Mr. Monda readily conceded that no witness saw the appellant kill the deceased as indeed none of the witnesses was at the house of the deceased at the relevant time. Boniface only saw a glimpse of a man but clearly he could not identify that man. The main evidence against the appellant was

that of the dying declaration of the deceased given to Boniface, Peter and Isaac long before the deceased died but given immediately the deceased was found on the ground along the road. Indeed, as far as Boniface was concerned, he heard the deceased screaming, he identified him by voice. He came out of his compound which was neighbouring the deceaed's compound. He saw the deceased come out of his house running. He followed him until he (deceased) fell down. He saw him with cuts on his head, and both hands. The deceased asked him to call Isaac. He administered first aid to the deceased and conversed with the deceased. That is when the deceased told him in Kikuyu what would be translated into English as *"Even if I die it is a man called Ngugi who has killed me. He was talking about the shamba last night."* That dying declaration was made almost immediately after the attack. Boniface had no time to concoct it. Equally, when Peter found the deceased on the ground, he asked Boniface to call Isaac. When Isaac was taking him to Kiambu District Hospital, the deceased again told Isaac that it was the appellant who had cut him. These were utterances made when events were still fresh, in the mind of the deceased and the deceased had just suffered the attack upon him. In our view, he made the declaration. Mrs. Nyamongo however, was of the view that the same could not be considered as dying declaration because the deceased died several days after the declaration was made. As pointed out earlier, when the provisions of ***section 33 (a)*** were drawn to her attention, she accepted that there is no time limit within which a person must die after making the declaration so as to make the declaration valid in law. We do not need to belabour that. Further, the declaration must, in our view, have been true. This is because when Peter was sent to buy milk, only the appellant and deceased remained in the compound but on his return Peter found the appellant absent and deceased seriously injured and lying down about 50 metres from his compound. Is it not telling that after only fifteen (15) minutes of Peter's absence from the compound, the deceased was so severely injured and yet the appellant who was left with him was nowhere to be seen.

Section 33 (a) of the Evidence Act Cap 80, Laws of Kenya provides at relevant part as follows:-

"33. Statements, written or oral, of admissible facts made by a person who is dead …………are themselves admissible in the following cases:-

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

This Court has considered the above provisions in several cases and indeed there is a wealth of authorities from this Court and its predecessor, the Court of Appeal for East Africa, on the nature and manner of receiving and considering evidence of dying declaration. In the case of ***Pius Jasanga s/o Akumu v. R (1954) 21 EACA 331,*** the predecessor to this Court stated inter alia:-

"The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval. …………

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v. Eligu s/o Odel and another (1943) 10 EACA 9, Re Guruswani (1940) Mad 158, and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused.

……………..But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross examination, unless there is satisfactory corroboration."

In our view, the learned Judge of the superior court was plainly entitled to admit as he did, and consider the dying declaration of the deceased made to Boniface, Peter and Isaac. We also find corroboration of that dying declaration in the conduct of the appellant in abandoning the deceased's house even before Peter whom he sent to buy milk had returned and about the time the deceased was attacked. His alibi was

clearly ousted by the overwhelming evidence of the prosecution witnesses and was rightly rejected by the trial court. Besides, on the basis of Peter's evidence the appellant had a duty to explain under what circumstances he parted company with deceased. Those circumstances raised rebuttable presumption that the appellant assaulted the deceased.

We agree with Mr. Monda that, the fact that the appellant was the only person left with the deceased at the time Peter went to buy milk and that thereafter the deceased was attacked and injured required the appellant to explain what would have happened to the deceased. He never gave that explanation. The trial court did accept Peter's evidence and we, as a first appellate court also do, on our own independent evaluation accept Peter's evidence that the appellant slept in the deceased's compound on 20th May 2000 and was there on the fateful morning of 21st May 2000. He was the only person left with the deceased that morning and immediately thereafter the deceased was found severely injured, which injuries ended in his death. He needed in those circumstances to explain what could have happened to the deceased or when he departed from the deceased and the condition of the deceased at that time of his departure. In the absence of that explanation, an inference, though rebuttable, would be made that he knew that attacker or was the attacker. Without rebutting the inference, the appellant remained the attacker.

Further, as we have stated, his conduct in leaving the deceased's house where he had spent the night that morning without waiting to bid bye bye to Peter left him a strong suspect.

Mrs. Nyamongo submitted that as a result of time lapse between the date and time of the deceased's attack and death, there could have been certain intervening circumstances such as his medical attention at hospital which could have caused his death. In so far as those aspects are not in evidence, a court of law cannot canvass them as that would mean importing into the judgment extraneous circumstances which the predecessor to this Court discouraged in the well known case of ***<u>Okethi Okale & others vs. R.</u> (1965) EA 555.*** In this case Dr. Wasike produced a post mortem report duly filled and signed by Dr. Maundu. The cause of death was stated therein and Mr. Akuma, the learned counsel who represented the appellant at his trial did not cross examine the doctor. He could have challenged it if there were other intervening matters that caused the deceased's death after the subject attack. He did not and the appellant must now hold his peace for ever. That allegation has no basis and nothing turns on it.

On whether the appellant's defence of alibi was considered, the judgment of the superior court speaks for itself. The learned Judge in that judgment almost reproduced the appellant's defence before him and having done so, he concluded that judgment with the part we have reproduced hereinabove and which we again reproduce only to confirm that the learned Judge considered the appellant's defence.

"The accused, on the other hand, appeared to me to be a person with no regard for the truth. I reject his alibi in toto. His defence is a hollow sham."

In short, the appellant's defence was considered and rejected. In our view and looking at the entire record, having accepted Peter's evidence as we have that the appellant spent the night of 20th/21st May 2000 in the deceased's kitchen in the same compound of the deceased and early next morning he gave Peter Ksh.20/- to go and buy milk, his evidence that he was not in that house on the night of 20th May 2000 cannot he true. That alibi defence was ousted once Peter's evidence was accepted as was done here and as we also do.

The sum total of all the above is that having anxiously revisited the evidence that was adduced in this case afresh, analysed it and re-evaluated it as we must do, being the first and also the last appellate court, but having also considered that the trial court had advantage of seeing and hearing the witnesses and having given allowance for that, our independent conclusion is that the appellant was indeed the perpetrator of the attack that resulted in the death of the deceased and we have no doubt in our mind that the trial court's decision cannot be interfered with. It will stand. The appeal has no merit. It is dismissed. Order accordingly.

Dated and delivered at Nairobi this 1st day of July, 2011.

S. E. O. BOSIRE

....

JUDGE OF APPEAL

E. M. GITHINJI

....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR